IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1379 130

IBRAHIM J. ABDALLAH,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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On the petition and brief.

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of IBRAHIM J. ABDALLAH respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in this cause on May 18, 1945 (163).

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and by Sections 687, 688, Title 18, U. S. Code, and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11.

The Circuit Court of Appeals for the Second Circuit affirmed the judgment of conviction on May 2, 1945, and the order for mandate was entered May 18, 1945 (158, 163).

Statute Involved

Section 2554 of the Internal Revenue Code (26 U. S. C. 2554) provides in part:

> "(a) * * * It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.
>
> * * * * *
>
> "(c) * * * Nothing contained in this section * * * shall apply—
>
> (1) To the dispensing or distribution of any of the drugs mentioned in section 2550(a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only. * * *"

Statement of the Matter Involved

The judgment of the Circuit Court of Appeals sought to be reviewed, affirmed a judgment convicting petitioner of violating Section 2554 of the Internal Revenue Code (26 U. S. C. 2554). The indictment contained six counts each charging the sale of a narcotic in violation of the aforesaid statute (9-11). Petitioner was acquitted on the first three counts and convicted on the remaining counts (145). He was given concurrent sentences of three and a half years (147).

The Government's proof showed that petitioner, a physician, issued narcotic prescriptions to a special employee of the Government (herein referred to as the entrapper)

(39-40). The entrapper testified that in obtaining such prescriptions he fraudulently misrepresented to petitioner that he was acutely suffering from bronchial asthma (44, 41) which prevented him and his wife from sleeping (15) and had required the prescription of morphine and ephedrine by his previous physician (15, 16, 23).

Petitioner prescribed morphine combined with ephedrine (77, Exs. 1-12) the latter drug being a specific for respiratory ailments, the morphine constituting a sedative for severe asthmatic seizures (78, 96, 124-125; MEAKINS PRACTICE OF MEDICINE, 1936, p. 1275; ANDERS PRACTICE OF MEDICINE, Fourteenth Ed. p. 531).

The Government's proof also showed that an essential element of the crime, viz., the very sale of the drug by the druggist, was procured by the Government under an arrangement wholly unknown and unrelated to petitioner, previously made between the entrapper and the druggist, who was a complete stranger to petitioner (45-47, 71). Under that arrangement the druggist sold plain morphine in complete disregard of the prescription which called for its combination with ephedrine (46, 73). Thus, after petitioner issued the prescriptions they immediately were turned over to the Government agent who took the entrapper to the Bronx where he was given the purchase price by the Government agent and directed to purchase the drugs under the aforementioned arrangement (45, 71, 72), and immediately, upon completion of the purchase, the drugs were turned over to the Government agent (47). In fact, while petitioner actually was under arrest after the entrapper's last visit, the Government went through the same procedure in procuring the sale of the drug (63, 71); and petitioner was convicted of that very sale under the sixth count of the indictment (11, 145).

The Government was permitted to introduce into evidence, over objection and exception, 115 prescriptions

wholly unrelated to the indictment, issued to various patients over a period of fifteen months (71, 91, Ex. 14), without proof that any of the said prescriptions had been issued in bad faith or contrary to proper medical practice. The Government agent was permitted to testify over objection and exception as to the search which located such prescriptions (68-71). Moreover, the Government's attorney, over objection and exception, cross-examined petitioner at length as to the prescriptions issued to one Charles DeRosa (not involved in the indictment) and by such cross-examination suggested that DeRosa was an addict and that prescriptions to him were issued illegally, all without any foundation therefor (113-116).

Opinion Below

There was no written opinion in the District Court. The opinion of the Circuit Court, not yet officially reported, is printed at pages 158 to 163 of the record.

Questions Presented

1. Did the Government's procurement of the sales of the drug by the druggist under the facts of this case constitute, and was it properly chargeable against petitioner as, an essential element of the crime alleged in the indictment?

2. Did the Circuit Court err in holding that such procurement by the Government of such sales of the narcotic was properly chargeable against petitioner on the grounds that "Here the crucial act was committed once the prescriptions were issued. The filling of the prescriptions merely carries the act to the final point where it becomes punishable as the crime in question." (161)?

3. Did the procurement by the Government of the sale under the sixth count, while petitioner actually was under arrest constitute, and was it properly chargeable against him as, an essential element of the crime alleged in the indictment?

4. Did the Circuit Court err in sustaining the conviction despite the Government's own proof as to the manner in which the sales of the drug were procured?

5. Did the Circuit Court err in holding that there was no entrapment as a matter of law, despite the Government's own proof which showed that its entrapper, in obtaining the prescriptions, employed the fraudulent deception that he was acutely suffering from a chronic illness—a deception calculated to induce a physician to believe that he was prescribing lawfully?

6. Did the Circuit Court err in holding that there was no entrapment as a matter of law, despite the failure of the Government to show that there was any justification for subjecting petitioner to the trap, in that there was no proof that prior to the trap the Government had reasonable cause to suspect petitioner, or that petitioner had been engaged in crimes of a similar nature prior to the trap?

7. Did the Circuit Court err in sustaining the conviction despite the Government's own proof which showed that it procured the completion of the alleged crime as well as employed a deception calculated to cause the suspect to believe that he was not committing the crime?

8. Did the Circuit Court err in sustaining petitioner's conviction of having made sales of the narcotic despite the Government's own proof that petitioner had no arrangement or conspiracy with the druggist who made the sale?

9. Did the Circuit Court err in holding that the 115 prescriptions were properly admissible in evidence and that the testimony and cross-examination with regard thereto did not constitute reversible error, and that *McLafferty* v. *U. S.*, 9th Circuit, 77 F. (2d) 715 does not rule against the admissibility of such evidence?

Reasons for the Granting of the Writ

1. Each of the questions presented herein embody questions of Federal law which have not but should be settled by this Court.

2. The questions presented above are important and have been decided by the Circuit Court in a way probably untenable as well as in conflict with the weight of authority applicable thereto.

3. The holding of the Circuit Court as to the evidence claimed to be prejudicial error is at variance and in conflict with the decision of the 9th Circuit in *McLafferty* v. *U. S.*, 77 F. (2d) 715 as well as the decision of the Eighth Circuit in *Nigro* v. *U. S.*, 117 F. (2d) 624, 632.

4. The decision of the Circuit Court that a physician's issuance of the prescriptions, without any conspiracy or arrangement between petitioner and the druggist making the sale, constitutes a violation of the statute involved, appears to be in conflict with or misconstrue the decisions of this Court, particularly *U. S.* v. *Jin Fuey Moy*, 254 U. S. 189, and is at variance with the decision of the Sixth Circuit in *Morei* v. *U. S.*, 127 Fed. (2d) 827.

5. The decision herein sustains a conviction of petitioner for acts on his part which fail to constitute the crime charged in the indictment, and is a violation of petitioner's

rights under Article V of the Amendments of the Constitution, in that by such decision he is being deprived of his liberty without due process of law.

WHEREFORE, petitioner prays that a writ of certiorari be issued to the Circuit Court of Appeals for the Second Circuit to the end that this cause and the judgment of the said Court may be reviewed and determined by this Court; that the judgment of the said Circuit Court of Appeals for the Second Circuit be reversed and the indictment dismissed, and that petitioner be granted such other and further relief as may be proper.

Dated, June 12, 1945.

IBRAHIM J. ABDALLAH,
Petitioner.

By SAMUEL RUBINTON,
Attorney for Petitioner,
32 Court Street,
Brooklyn 2, N. Y.

CHARLES WILSON,
On the Petition.

PETITIONER'S BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

IBRAHIM J. ABDALLAH,

Petitioner,

—against—

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Statement

The facts and rulings material to the consideration of the questions presented, in addition to the extent discussed in the foregoing petition, will be fully stated in the argument *infra.*

ARGUMENT

I

The sale of the drug by the druggist was an essential element of the crime, yet although the sales herein were procured wholly by the Government they were charged against petitioner with the same force and effect as though they were his own acts, contrary to every concept of law and justice.

A. **The sale of the drug by the druggist is an essential element of the offense charged in the indictment.** It is the

sale of the narcotic that is prohibited by the statute and therefore, the issuance of a narcotic prescription, does not ripen into a crime until the sale is procured by the filling of the prescription (*Strader* v. *U. S.*, 72 Fed. (2d) 589, 590; *U. S.* v. *Lindenfeld*, 142 Fed. (2d) 829, 832 footnote 1; *Acton* v. *U. S.*, 3 Fed. (2d) 992; *DeVall* v. *U. S.*, 82 Fed. (2d) 382, 383). Indeed, that rule would seem implicit in this type of case since it hardly could be said that a physician is guilty of aiding, abetting or procuring a sale which never was made. The validity of this rule was recognized by the Court below (160).

B. **The sales of the drug herein were procured wholly by the Government.** While petitioner was attending to his medical practice, the Government proceeded to procure the sales of the drug under an entirely separate trap for the druggist with whom petitioner had no arrangement, connection or acquaintance and whose drugstore was located in the Bronx, far distant from petitioner's Brooklyn office. This trap with respect to the druggist, was based on an arrangement the entrapper previously had made with the druggist whereunder the druggist was not to fill the prescriptions but was to give the entrapper plain morphine (45, 47, 72-73) and in that manner, the druggist sold plain morphine in complete disregard of the prescriptions, the said drug paid for with Government money, immediately having been turned over to the Government upon completion of the purchase (45-47, 71-73).

C. **In criminal offenses committed pursuant to traps the prosecution must fail if any act necessary to complete the crime was performed or procured by the Government or its agents.** The accused must have, himself, done everything essential to make out a complete offense against the law. The entrapping officer may not perform any essential act

and the prosecution will fail if it is necessary that something done by the entrapping officer should be imputed to the accused in order to constitute the offense.

22 *Corpus Juris Secundum,* 104, Criminal Law, Section 45(b);
16 *Corpus Juris,* 90, Note 53 (a) and cases cited;
DeMayo v. *U. S.,* 32 Fed. (2d) 472, 474;
People v. *Lanzit,* 70 Cal. App. 498, 509;
Dalton v. *The State,* 113 Ga. 1037;
State v. *Decker,* 321 Mo. 1163, 1169, 1170;
Williams v. *Georgia,* 55 Ga. 391, 395.

The Decision of the Circuit Court. The Court below disposed of the authorities above cited and of petitioner's contention herein by saying (161):

"We need not stop to consider how far this principle may be soundly pressed, since all that these cases stand for is that acts done by a detective in building up the commission of an offense cannot be imputed to a defendant. They do not determine or limit the participants in steps leading to the completion of the offense once it is shown to have been committed. Here the crucial act was committed once the prescriptions were issued. The filling of the prescriptions merely carries the act to the final point where it becomes punishable as the crime in question. Thus the administering of poison may not constitute murder until the victim perishes; but once this occurs, the act of administering constitutes the offense. And the crucial act of issuance of the prescriptions was one not performed by the detective or decoy, but by the defendant of his own volition and intent."

Discussion. When the prescription was issued by petitioner to the entrapper the crime at the most was inchoate and incomplete. If the prescriptions never were filled there could be no crime and no violation of the statute. The Government, however, inexorably undertook to see that the crime purportedly was completed by procuring the sale from a druggist who was a stranger to petitioner—under an arrangement unknown and wholly unrelated to petitioner, which had been made before the trap was laid for petitioner.

The particular vice of attributing to petitioner and convicting him upon these very acts of the Government may be visualized by the following *hypothetical* example: Let us assume that by statute one who transfers, without license, a firearm to another, is responsible for any homicide thereafter committed with such firearm; and further assume that an entrapping agent of the Government thus obtains a firearm from a suspect and thereafter causes such firearm to be used in the commission of a homicide. If, in such case the ruling above made by the Circuit Court were to be applied, the suspect who originally transferred the firearm could be convicted to the homicide although it was deliberately caused to be committed by the Government entrapper for the purpose of purporting to complete the crime under the statute.

Assuming arguendo that a physician could be held responsible for a sale made after the issuance by him of a prescription to an ordinary addict, under the theory that such sale was an ordinary consequence of the physician's act, petitioner still would not be liable since the sales herein in no event could be classified as the consequence, ordinary or otherwise, of his act. To the contrary the sales were deliberately effected under a pre-arrangement between the Government entrapper and the druggist made prior to the issuance of the prescriptions. Under those circumstances, the sales herein cannot be said to have been set in motion in the

ordinary course of events by petitioner's issuance of the prescriptions.

A striking example of the fallacy of the ruling of the Circuit Court is furnished under the sixth count, (161) where petitioner was arrested immediately upon his issuance of the three prescriptions involved in such count (63) whereas the actual sale of the drug took place after his arrest (71). Even in a conspiracy, the arrest of one of the conspirators is deemed to terminate the conspiracy (*McDonald* v. *U. S.*, 89 Fed. (2d) 128). In this instance, more ironically, the Government first arrested petitioner for the commission of a crime which the Government thereafter caused to be completed. Aside from the fact that the conviction under the sixth count is void, the incident serves to exemplify the invalidity of the proof as to the sale with respect to each and every other count.

Traps are permitted in the interests of law enforcement to permit one with a justly suspected criminal inclination an *opportunity* to commit a crime. Certainly it is far beyond the scope of such traps and contrary to public policy to permit law enforcement agencies actually to procure the completion of an offense which otherwise may never have been completed.

It is reasonable to see that an addict who obtains a narcotic prescription from a physician (if not a Government entrapper directed by the Government to have the same filled) for any of virtually a thousand reasons may never have the prescription filled, in which event the offense would not be completed and the physician would not be liable.

> "The accused may not be deprived of that period of immunity by the act of a government officer who is not in law a co-conspirator." (*De Mayo* v. *U. S., supra.*)

The Circuit Court justified the Government's procurement of the sales by saying: "The filling of the prescrip-

tions merely carries the act to the final point where it becomes punishable as the crime in question." The actual sale of the drugs—the additional element here required to convert petitioner's act into a crime—was most crucial and cannot be minimized. It was not accomplished by a passive or automatic maturing of petitioner's act. To the contrary, the sale here was procured by affirmative, positive, deliberate and pre-arranged action wholly on the part of the Government—a perfect example of a Government-synthesized crime.

II

Entrapment as a matter of law was established (a) by the Government's own proof which showed that the entrapper in obtaining the prescriptions employed a deception calculated to cause petitioner to believe that he was performing a lawful act in issuing the same; (b) by the failure of the Government to show that it had any justification in subjecting petitioner to a trap.

A. The methods employed in the trap were repugnant to justice and required the Court, on its own motion, to stop the prosecution. In the interests of law enforcement Government officers are permitted to employ stratagems or deceptions which seek to test or detect any criminal tendencies of the suspect (*U. S.* v. *Wray*, 8 Fed. (2d) 429, 430). Thus, the officer may pretend that he is an addict craving drugs or that he requires the drugs for illegal use. Such stratagems serve a proper purpose since, by their very nature, they immediately put the suspect on notice that he is being given an opportunity to participate in a *crime*. Where, however, the enforcement officer employs a deception calculated to induce the suspect to believe that he

is not committing or being solicited to commit a crime, the conditions of the legal trap are non-existent; to the contrary the trap becomes one likely to ensnare the innocent and is repugnant to law and public policy.

The deception that the entrapper was suffering from chronic asthma (44) so that he and his wife were unable to sleep (15), aside from petitioner's uncontradicted testimony that the entrapper also stated that he was in danger of losing his job and his pension (95), constituted an attempt to deceive petitioner into thinking he was prescribing in good faith; in other words, to make petitioner believe that he was not committing a crime. Certainly that was not a method to detect or test criminal tendencies even if any justifiably were suspected. The entrapper by his own admissions pressed that deception through subsequent visits urging petitioner to verify his suffering by telephoning the entrapper's wife (19-20) and stating that his former physician had treated him by prescribing morphine and ephedrine (15, 16, 23). The Narcotics Bureau necessarily knew of the deception that the entrapper was employing herein since he made reports to the Narcotics Bureau of what took place upon these visits (38-39) which the entrapper used to refresh his memory in testifying on the trial (19, 20, 24, 38). True enough, the Court submitted to the jury the question as to whether petitioner had been overreached by the deception (140); but that was not the answer—it could not cure or eradicate the inherent vice of the methods so employed.

The Government has no right in the course of a trap to employ a deception calculated to induce a suspect to act in the belief that he is acting lawfully and then make him undergo the hazard of having a jury decide whether he was taken in by the Government's deception—a highly subjective test. That would be an effective method of trapping

the innocent. It seems ironical that the Government should claim that petitioner should not have been taken in by a deception which it permitted to be practiced upon him with every fraud and falsehood at the command of its entrapper. If the Government is permitted thus to impeach the issuance of prescriptions where such deceptions are practiced by it, then physicians would be constrained to deny to bona fide patients the prescription of narcotics required to relieve actual pain and suffering, lest the patient turn out to be an enforcement agent who would claim that he was merely simulating illness and that the physician did not "believe" the deception.

B. **There was no justification for the setting of the trap.** In order to justify the trap, the Government, prior to setting the trap is required to have had reasonable cause to believe that defendant was committing crimes of the nature involved.

> *DeMayo* v. *U. S.*, 32 Fed. (2d) 472, 474-5;
> *Fiske* v. *U. S.*, 279 Fed. 12;
> *Parton* v. *U. S.*, 261 Fed. 515;
> *U. S.* v. *Reisenweber*, 288 Fed. 520;
> *Lucadamo* v. *U. S.*, 280 Fed. 653, 657, 658;
> *Weathers* v. *U. S.*, 126 Fed. (2d) 118, 119.

In the absence of such *prior* "reasonable cause", the only other proof by which the trap possibly may be justified, is that the defendant actually had engaged in a continuous series of similar crimes, prior to the trap.

> *Weiderman* v. *U. S.*, 10 Fed. (2d) 745;
> *U. S.* v. *Becker*, 62 Fed. (2d) 1007.

The record herein is entirely devoid of proof on either theory. The evidence and testimony regarding the 115

prescriptions (discussed under point "III" *infra*) cannot be deemed to have established prior reasonable cause, since there is no evidence whatever that the Government was informed of the same prior to the setting of the trap; to the contrary, the Government's proof shows that the 115 prescriptions first were discovered after petitioner's arrest (68-70); moreover, as shown in point "III" *infra*, such evidence failed completely as proof of the commission of any prior or other offenses by petitioner.

This creation of *criminals*—"detective-made criminals"—repeatedly has been condemned by the Courts. Here, in addition to that we have a detective-made *crime* ("I" *supra*). Certainly under such circumstances, the Court was required to stop the prosecution (see separate opinion of Mr. Justice Roberts in *Sorrells* v. *U. S.*, 287 U. S. 435, 457).

We respectfully submit that the ruling of the Circuit Court on this question was erroneous and did not answer the issues raised (161).

III

The admission into evidence of the 115 prescriptions unrelated to the indictment and the testimony concerning the same as well as the cross-interrogation of the petitioner with respect thereto was highly prejudicial and deprived petitioner of a fair trial.

The Government elicited testimony from its agent that it caused an examination to be made of drugstores in the neighborhood of petitioner's office and thereby located 115 prescriptions, each of which contained a narcotic derivative as one of the ingredients prescribed (68-71). This testimony as well as the admission into evidence of the said prescriptions was permitted over petitioner's objec-

tion and exception (71, 91; Ex. 14). None of the said prescriptions were issued to the entrapper or was otherwise connected with the indictment. No evidence was introduced to show that any of them were issued in bad faith or contrary to medical practice.

In addition to this, the Government was permitted, over objection and exception, to cross-examine petitioner concerning those of the prescriptions issued to Charles DeRosa (113). Such interrogation was extensive and persistent and clearly conveyed to the jury the implication and suggestion that DeRosa was a drug addict and that petitioner had issued to him fifty illegal prescriptions (113-116); all in the absence of any proof whatever that DeRosa was a drug addict or that he had been treated by petitioner other than in the proper course of medical practice.

The aforesaid interrogation together with the admission into evidence of the 115 prescriptions and the testimony of the Government agent concerning the location thereof, necessarily conveyed to the jury a picture, unjustified by the proof, that petitioner was engaged in the operation of a veritable prescription mill for drug addicts. These 115 prescriptions issued over a period of about eight months (Ex. 14) could not be deemed unusual or excessive for that period of time.

The aforesaid evidence being unrelated to the offenses charged in the indictment could have been admitted only as proof of other similar crimes; and in that respect they failed since such proof is required to be plain, clear and conclusive, evidence of a vague and uncertain character being inadmissible.

McLafferty v. *U. S.* (C. C. A. 9), 77 Fed. (2d) 715, 719;

Paris v. *U. S.* (C. C. A. 8), 260 Fed. 529, 531;

Fabacher v. *U. S.* (C. C. A. 5), 20 Fed. (2d) 736, 738;
Nigro v. *U. S.* (C. C. A. 8), 117 Fed. (2d) 624, 632.

We respectfully submit that the decision of the Circuit Court is at variance with the above decisions of other Circuits and erroneously upheld the above mentioned evidence, testimony and cross-interrogation (162-3).

IV

The mere issuance of the prescriptions by petitioner without arrangement or conspiracy with the druggist making the sales, failed to constitute a violation of the statute involved.

Prior to the decision of this Court in *U. S.* v. *Jin Fuey Moy,* 254 U. S. 189, it appeared generally settled that the mere issuance of a prescription for narcotics to a drug addict did not constitute a "sale", regardless of the question as to the good faith of the physician in so prescribing, unless the facts established a pre-arrangement or conspiracy between the physician and the druggist who actually dispensed the narcotics. (*DiPreta* v. *U. S.* (2nd C.), 270 Fed. 73; *Foreman* v. *U. S.* (4th C.), 255 Fed. 621; *Doremus* v. U. S. (5th C.), 262 Fed. 849; *Jackson* v. *U. S.* (8th C.), 297 Fed. 20; *Manning* v. *Biddle* (8th C.), 14 Fed. (2d) 518).

In the *Jin Fuey Moy* case the facts (p. 193) clearly established a pre-arrangement to sell narcotics between the physician and the druggist, whereunder drug addicts who applied to the physician were given a prescription and sent to the particular druggist who dispensed the same, and conversely addicts who applied to the druggist were sent to the physician for the prescriptions upon which the druggist purported to dispense the narcotics. Thus, it was

manifest that there was a conspiracy between the druggist and the physician to bring about the sale, and by issuing the prescription the physician deliberately and knowingly aided and abetted his confederate, the druggist, in making the prohibited sale, which at common law would constitute the physician an accessory. The ruling in the *Jin Fuey Moy* case that under Section 332 of the Criminal Code the physician was responsible as a principal for the violation of the statute prohibiting the sale, necessarily would appear to have been based upon the foregoing facts showing a pre-arrangement or conspiracy (p. 192). It would appear from the words of qualification on page 192 of the *Jin Fuey Moy* decision, as well as the general context, that this Court based its ruling that the physician was liable for the prohibited sale upon the fact that the sale in that case was procured as the result, not merely of the issuance of the prescription, but of the conspiracy between the physician and the druggist pursuant to which it was issued.

Morei v. *U. S.*, 127 Fed. (2d) 827 clearly shows that Section 332 of the Criminal Code (under which the physician was held to be a principal in the *Jin Fuey Moy* case) can have no application unless there is a conspiracy or "community of unlawful intention" (p. 831) between the physician and the druggist. The Circuit Court for the Sixth Circuit there held that in order to constitute the defendant physician as a principal under Section 332, it must be established that by common law rules he would be an accessory before the fact. The Court there pointed out (p. 831) that Section 332 did not create a "new crime theretofore unknown," but merely enabled the Government to prosecute an accessory before the fact as a *principal;* and that to be an accessory before the fact, it must be shown that there was a pre-arrangement between the physician and the actual seller to commit the prohibited act.

We believe that the *Morei* decision (p. 831) properly construed the *Jin Fuey Moy* case as involving "parties who, under common law would be liable as aiders and abettors or accessories", thus indicating that that Circuit Court regarded the *Jin Fuey Moy* ruling as based upon and limited to facts showing the physician to be acting under a pre-arrangement with the druggist.

The decision of the Court below with respect to this point (158-9) as well as the decisions upon which its ruling herein appears to be founded, *viz. Nigro* v. *U. S.*, 117 Fed. (2d) 624; *U. S.* v. *Lindenfeld*, 142 Fed. (2d) 289, and other decisions of like effect, purport to create a theretofore unknown criminal liability, and one peculiar to the Harrison Narcotics Act, rendering liable as principals those who at common law would not constitute even accessories, thereby convicting physicians of "aiding and abetting sales" by druggists unknown to the physicians. The said decisions appear to have misconstrued the ruling in the *Jin Fuey Moy* case as wholly unrelated to the facts there which showed a conspiracy between the physician and the druggist.

For these reasons we respectfully submit that the ruling on this point by the Court below is in error.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

CHARLES WILSON,
On the brief.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 130

IBRAHIM J. ABDALLAH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 158–163) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 18, 1945 (R. 163–164). The petition for a writ of certiorari was filed June 15, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a physician issuing narcotic prescriptions in bad faith to an addict commits a violation of the Harrison Narcotic Act where there is no collusion between the physician and the pharmacist who fills the prescriptions.

2. Whether the physician is relieved from liability by reason of the fact that the addict, who was a government informer, caused the prescriptions to be filled.

3. Whether the fact that the informer addict falsely told petitioner that he was suffering from a chronic disease in itself established the defense of entrapment where there was evidence that petitioner was not deceived by such claim.

4. Whether the absence of proof that the Government had reasonable grounds of suspicion before employing an informer to investigate petitioner precludes petitioner's conviction on the basis of the informer's testimony, such proof of reasonable grounds having been excluded on petitioner's motion.

5. Whether it was proper to admit evidence of a number of other prescriptions for narcotics issued by petitioner.

STATUTE INVOLVED

Section 2554 of the Internal Revenue Code (26 U. S. C. 2554) provides in part:

> (a) * * * It shall be unlawful for any person to sell, barter, exchange, or give

away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

(c) * * * Nothing contained in this section * * * shall apply—

(1) * * * To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only. * * *

STATEMENT

An indictment in six counts was returned against petitioner, a physician (R. 92), in the United States District Court for the Eastern District of New York, charging him with unlawful sales of morphine on six different dates (R. 7–11). Petitioner was found guilty on the last three counts (R. 5, 145), and he was sentenced to imprisonment for three and one-half years on each, the sentences to run concurrently (R. 5). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed (R. 163).

The evidence for the Government may be summarized as follows:

On March 10, 1943, one Port, a narcotic addict who acted as a government informer, called at

petitioner's office, told petitioner that he was suffering from bronchial asthma, and asked to be examined (R. 14–15, 16). Petitioner examined Port with a stethoscope and stated that he could find nothing wrong, that Port was "only an addict" (R. 15). Petitioner examined Port's arm which bore needle marks and remarked that Port was "shooting it in the vein" (R. 16). At the conclusion of the visit petitioner gave Port a prescription for morphine sulphate and ephedrine sulphate and charged him a fee of $4 (R. 17; see also R. 77). Port called at petitioner's office on five other occasions between March 12 and March 30 and each time petitioner gave him similar prescriptions for morphine sulphate and ephedrine sulphate (R. 20–21, 22–24, 25–26, 28, 30–31, 33–35, 77). During Port's fourth visit on March 20, 1943, petitioner told him that if he had more money he would give him more prescriptions (R. 26–27). Port left and returned in about an hour with $8 for which petitioner gave him two prescriptions (R. 28). On the last two visits Port brought $12 with him and received three prescriptions each time (R. 31, 33, 35). Petitioner told Port not to have the prescriptions filled at one drug store and to tear the labels off the boxes containing the prescribed capsules (R. 21, 28, 34). During Port's last visit, petitioner stated that the next time he would write a prescription in the name of one of Port's friends (R. 35).

Petitioner did not examine Port except at the time of the first visit (R. 37).[1] Port received twelve prescriptions as a result of six visits to petitioner (R. 36; see R. 111–112).

In each instance the money given by Port to petitioner was supplied by a narcotic agent (R. 15, 18, 23, 25, 31, 32, 33, 56, 58, 59, 60, 62). After each visit Port showed the prescription to the agent (R. 18, 22, 25, 26, 30, 56, 58–59, 61–63), and subsequently had the prescriptions filled by a pharmacist (R. 36, 45) with money supplied by the agent (R. 72). In accordance with a prior arrangement between Port and the pharmacist, Port was supplied with straight morphine sulphate in the amount called for by the prescription instead of morphine and ephedrine (R. 46–47, 73).

Port was examined at the United States Marine Hospital about a year before and a year after his visits to petitioner, and on neither occasion was there any evidence of bronchial asthma (R. 81–83), a chronic disease with objective symptoms (R. 84, 96). In medical opinion, morphine sulphate is not a specific remedy for asthma and should not be used in the treatment of that ailment except in extreme cases where a patient suffers from lack of sleep (R. 84–85; see R. 119–120).

[1] The agent who observed Port enter and leave petitioner's office testified that on most of these occasions Port was in the office with petitioner less than five minutes (R. 58–62).

ARGUMENT

1. Petitioner's contention that the issuance of a prescription by a physician, even if in bad faith, cannot constitute the offense of unlawfully selling narcotics unless there is some prearrangement between the physician and the pharmacist who fills the prescription (Pet. 5, 6, 19–21), is without support in the decisions. In *United States* v. *Behrman,* 258 U. S. 280, this Court sustained the validity of an indictment which charged a physician with the unlawful sale of narcotics by issuing prescriptions for an excessive amount of the drug to a known addict with the intent that the addict would thereby obtain the drugs from a pharmacist, thus holding, at least by implication, that it was unnecessary to allege collusion between the physician and pharmacist. Numerous decisions of various circuit courts of appeals have either specifically held or have assumed that a physician issuing a prescription for narcotics in bad faith is liable under the statute, irrespective of the guilt or innocence of the pharmacist who fills the prescription. *Nigro* v. *United States,* 117 F. 2d 624, 631 (C. C. A. 8); *Manning* v. *United States,* 31 F. 2d 911, 913 (C. C. A. 8); *Nelms* v. *United States,* 22 F. 2d 79, 81 (C. C. A. 9); *Freeman* v. *United States,* 86 F. 2d 243, 244 (C. C. A. 5), certiorari denied, 299 U. S. 616; *United States* v. *Lindenfeld,* 142 F. 2d 829, 831 (C. C. A. 2), certiorari denied, 323 U. S. 761. It is true that in

the case of *Jin Fuey Moy* v. *United States,* 254 U. S. 189, cited by petitioner (Pet. 20), this Court held the physician liable on the theory that he was an aider and abettor, or an accessory before the fact (Sec. 332 of the Criminal Code; 18 U. S. C. 550), but it should be noted that the evidence in that case established collusion between the physician and the pharmacist, and it was therefore unnecessary for the Court to consider the liability of a physician who causes the sale through the instrumentality of a pharmacist with whom he has no prearrangement. *Morei* v. *United States,* 127 F. 2d 827 (C. C. A. 6), upon which petitioner also relies (Pet. 20), is distinguishable in that there the physician merely gave the informer the name of the man from whom heroin might be purchased to dope race horses, but did not actively participate in bringing about the sale in the same way as does a physician who issues a prescription calling for the delivery of narcotics by a pharmacist.

2. Petitioner also contends (Pet. 4, 5, 9–14) that since the offense was not complete until the prescription was filled, and since the prescriptions were filled as the result of a prearrangement between the government informer and the druggist, petitioner was not guilty of the offense condemned by the statute, the informer's acts not being imputable to him. The cases upon which he relies (Pet. 11) turn on the theory of

entrapment, i. e., that a defendant should not be held liable where the decoy performs the crucial act constituting the crime. Here, however, as the court below pointed out (R. 161), the crucial act was the issuance of the prescription, and petitioner alone performed that act. The filling of the prescription was merely the natural consequence of petitioner's guilty act, a consequence anticipated by petitioner. Since, as we have shown (*supra,* pp. 6–7), the lawfulness or unlawfulness of the means by which the prescription was filled is not relevant in determining petitioner's guilt, it is unnecessary to impute the informer's act to him in order to sustain his conviction.[2] The defense of entrapment is not available where government agents merely allow "the crime already conceived to be carried out sufficiently to obtain evidence necessary for a conviction of the crime." *Farber* v. *United States,* 114 F. 2d 5, 10 (C. C. A. 9), certiorari denied, 311 U. S. 706.[3]

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[2] There was evidence (*supra*, p. 5) that the pharmacist did not fill the prescriptions in strict accordance with their terms but gave petitioner straight morphine sulphate in the amounts called for by the prescriptions. This separate arrangement was, of course, not imputable to petitioner, but, as the court below said (R. 160), the crime is the sale of morphine by means of the illegal prescription, and it is immaterial that, in using the prescription for such purpose, the pharmacist may have failed to include ingredients other than morphine which were prescribed.

[3] Petitioner's contention (Pet. 5, 13) that his conviction on the sixth count is invalid because the prescription was filled

3. Petitioner argues (Pet. 5, 14–16) that the informer's false statement during his first visit that he suffered from chronic asthma in itself established the defense of entrapment. However, the informer testified that at the first visit, petitioner was aware that he was an addict and, moreover, there was expert testimony that morphine sulphate is not, ordinarily, a proper treatment for asthma. It thus clearly appears that the informer's statement was not the cause of petitioner's unlawful acts. Furthermore, the jury convicted petitioner only on the last three counts, based upon later visits at which petitioner gave the informer several prescriptions at one time, a fact clearly tending to establish bad faith on petitioner's part. At most, the issue of entrapment was a question of fact (*Sorrells* v. *United States,* 287 U. S. 435), which the jury, under proper instructions (R. 140–142), has resolved against petitioner.

4. There is no merit in petitioner's further contention (Pet. 5, 16–17) that his defense of entrapment must be sustained because there was no proof that the Government had reasonable grounds to believe that he was engaged in illegal traffic in narcotics before it utilized an informer. However, the Government attempted to introduce evidence of such reasonable cause but it was ex-

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after his arrest, is immaterial, since he received concurrent sentences on the three counts on which he was convicted. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.

cluded on objection by petitioner's counsel (R. 55, 79). Moreover, as the court below pointed out (R. 161–162, fn. 1), the existence of reasonable grounds for suspicion is not an absolute prerequisite to the use of decoys and the Government is not required to introduce such evidence as a condition precedent to the informer's testimony. Such testimony is merely relevant to the question whether the person accused was without criminal intent before being approached by the informer (see *Swallum* v. *United States*, 39 F. 2d 390, 393, (C. C. A. 8)). The absence of evidence of reasonable cause therefore operated in petitioner's favor since such evidence would have tended additionally to overcome his defense of entrapment.

5. The Government introduced in evidence 115 prescriptions for narcotics issued by petitioner which were found in drugstores in the immediate neighborhood of his office (R. 68–71, 91). When petitioner took the stand in his own behalf, he was cross-examined as to 50 of these prescriptions, calling for morphine and ephedrine sulphate, issued over a period of seven months to one De Rosa, who petitioner asserted was suffering from chronic bronchitis (R. 113–116). Petitioner attacks the admission of such evidence and his cross-examination in respect thereof (Pet. 6, 17–19) on the ground that the Government failed to show that these prescriptions were unlawfully issued. However, the fact that petitioner issued such a large number of narcotic prescriptions,

and in particular the fact that so many were issued to De Rosa in a comparatively short space of time, was a sufficiently suspicious circumstance to make this evidence relevant to the issue of petitioner's criminal intent. *Weaver* v. *United States,* 111 F. 2d 603, 606 (C. C. A. 8); *Freeman* v. *United States,* 86 F. 2d 243, 244 (C. C. A. 5), certiorari denied, 299 U. S. 616; *Harris* v. *United States,* 273 Fed. 785, 791 (C. C. A. 2), certiorari denied, 257 U. S. 646; *Dysart* v. *United States,* 270 Fed. 77, 79 (C. C. A. 5), certiorari denied, 256 U. S. 694.

CONCLUSION

The decision below is correct and there is involved no real conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 130

IBRAHIM J. ABDALLAH,

Petitioner

—v.—

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

On the question involving the Government's procurement of the sales of the narcotic, the Government's opposing brief (p. 5) states that the entrapper "showed" the prescriptions to the agent. The record, however, clearly shows that the prescriptions were *handed over* to the agent for the Narcotics Bureau immediately upon the entrapper's emergence from petitioner's office (18, 22, 25, 26, 28, 30, 33, 36, 45, 71); thus conclusively establishing that the Government had actual possession of the prescriptions prior to the time it procured the sales of the narcotics—without which sales there could be no crime under the statute.

On the same question the Government's brief (p. 8) cites *Farber* v. *United States,* 114 Fed. 2d 5, 10 (C. C. A. 9),

certiorari denied, 311 U. S. 706. In that case the Government Agents merely stood by and observed the defendant commit and complete the crime solely by his own acts. There is nothing in that decision which would approve the completion of the crime, or the performance of any essential element thereof, by the Government.

Respectfully submitted,

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On the brief.